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No. 411.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

GEORGE SAM MAGIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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1.

(Government's Brief, pp. 8-11.)

The Court of Appeals below affirmed the conviction of petitioner of violating Tit. 18, § 1621, U. S. C. (perjury), by sustaining as without error the record of his trial which disclosed that although the trial judge had charged the jury—

> (1) that the essence of the crime was not objective disparity between fact and utterance, but subjective disparity between knowledge and utterance,

he had also charged—

> (2) that in determining whether petitioner harbored knowledge contrary to utterance the jury might

roam over all the evidence in the case and draw its conclusion circumstantially on the basis of "everyday common sense and knowledge" (App. 134-136)

There was no direct evidence of a fact emanating from the defendant showing that he had knowledge contrary to the statements made by him which furnished the basis of the prosecution.

Faced with the argument that the Second Circuit Court of Appeals, in **U. S. v. Remington**, 191 F. 2d 246 (cert. den. 343 U. S. 907), had held that a perjury conviction cannot stand without direct evidence by two witnesses (or one witness, corroborated) of facts emanating from the defendant showing a state of mind on his part contradicting his utterance, the Court of Appeals admitted the conflict but asserted that it would not conform because it believed the **Remington** decision to be "erroneous" (Pet., 50-51).

Faced with the argument that repeated federal decisions (including **Remington**) had ruled that a conviction of perjury may not be had on circumstantial evidence, the Court of Appeals responded by holding that "it is clear" that there are actually two elements of the crime of perjury —objective disparity and subjective disparity—and that circumstantial evidence is sufficient to prove the latter element "just as circumstantial evidence can be used in other criminal cases to establish guilt of an accused beyond a reasonable doubt" (Pet., 47, 48, 51).

The government now seeks to avoid the impact of this Court's Rule 19 (b) by taking the position (a) that notwithstanding the admission of conflict by the Court of Appeals below there actually is no conflict, and the Court of Appeals below simply did not understand the decision in **Remington**, and (b) that although circumstantial evidence may properly be relied upon to show perjurious knowledge, still there was, as a matter of fact, "substantial

direct evidence" below "from which the jury properly inferred" petitioner's knowledge contrary to his statements (Brief, 8-11).

(a)

The Court of Appeals below did not misunderstand or misinterpret **Remington**, and the only way in which the government can now make an argument that it did is by suppressing portions of the language of the Second Circuit court and of this Court in its quotations.

Thus, although on pp. 9 and 10 of its brief the government purports to quote **Remington** to show that any construction of it which would apply the so-called "two-witness" rule to the requirement of knowledge contrary to utterance is a "misinterpretation" of the decision, it simply neglects to quote **Remington's** ultimate and decisive ruling (191 F. 2d 249):

> "Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief."

Again, although in its quotation from **Remington** the government purports to requote the opinion of this Court in **American Communications Association v. Douds**, 339 U. S. 382, 411, it excises the final two sentences of the quotation, upon which **Remington** specifically relied (191 F. 2d 249):

> "False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist party, there can be no successful prosecution for false swearing."

Set in juxtaposition, the operative rulings of the two decisions are as follows:

Remington holds:	**The opinion below** holds:
A conviction under § 1621 cannot stand without evidence by two witnesses (or one witness, corroborated), showing knowledge on the part of the defendant contrary to his utterance. 191 F. 2d 249.	A conviction under § 1621 can stand without evidence by two witnesses (or one witness, corroborated) showing knowledge on the part of the defendant contrary to his utterance. Pet., 50, 51.
The evidence of knowledge contrary to utterance must consist of direct evidence of overt acts emanating from the defendant showing his state of mind. 191 F. 2d 249.	The evidence of knowledge contrary to utterance need not be direct evidence of overt acts emanating from the defendant; it may be wholly circumstantial. Pet., 50, 51.

It is not possible, we submit, rationally to assert that these rulings do not present a square and definite conflict.

(b)

The "substantial direct evidence from which the jury properly inferred that petitioner intended to testify falsely," as the government puts it, consisted, according to the government, of petitioner's personal income tax returns and petitioner's statements before the grand jury that he had known Dowling for three or four years and that Wortman had been his friend and neighbor nine years.

The personal income tax returns did not contain a line, word or syllable showing that Dowling or Wortman or either of them held or owned any interest in the gaming ventures. Petitioner was not charged with testifying be-

fore the grand jury that he did not own a share in the ventures; he was indicted for testifying that he had never been a business associate or partner with Dowling or Wortman. We do not believe that it can be argued fairly that an admission that one has received dividends from an enterprise is even circumstantial evidence that he knew other owners of interests in the enterprise, but to assert that it is direct evidence of a manifestation of a state of mind including that precise knowledge is simply absurd. And it is not rendered any the less absurd by bundling it up with oral statements by the petitioner that he had known persons shown to have been shareholders for four years and nine years, respectively.

The flat assertion by the government that the petitioner's tax returns were written evidence, emanating from the accused, and thus sufficient to bring the case within the holding in **U. S. v. Wood**, 14 Pet. 430, 439, is indefensible. As has been repeatedly pointed out, the written evidence in **Wood** was in itself directly contradictory of the allegedly perjurious statement. Here the petitioner's tax returns indeed showed that he was a shareholder in the enterprises, and showed that he knew **he** was a shareholder; but that he never denied. His denial, for which he is prosecuted, was that Dowling and Wortman were his business partners or associates; and as to that denial there is not a whisper to the contrary in the tax returns.

The remarks in the opinion of the Court of Appeals below (Pet., 51) that—

> "It would indeed strain a juror's credulity to the breaking point to believe that one who had been associated with a relatively small group in a number of unlawful endeavors for a period of five years, did not know those associated with him."

quoted with approval in the government's brief here, are simply obfuscatory of the question in issue. No one below

argued what the jury should, or should not have, believed; what was argued was whether the government adduced evidence which, under the law, was sufficient to warrant a conviction for the particular crime charged.

(c)

Both the Court of Appeals below and the government before this Court hinge the case on the theory that there are two elements in a prosecution for violation of § 1621 — the element of objective falsity (or disparity between fact and utterance) and the element of subjective falsity (or disparity between belief and utterance). The truth (which we pointed out below and our petition here) is that there are not two elements of the crime denounced by the statute, but only one, and that one is the disparity between belief and utterance.

The section does not denounce as criminal the stating under oath of that which is not factually so; it does not denounce the stating under oath of that which is not factually so and which is not believed to be so; it simply denounces the statement of that which the person "does not believe to be true," without more.

What the Court of Appeals has done, and what the government would have this Court do, is read into the statute more than is contained therein and then transfer to the element thus created out of thin air all the stringent rules applicable to the prosecution, leaving the element actually in the language of the law to be proved by any means acceptable to general criminal procedure.

2.

(Government's Brief, pp. 11-12.)

Again demonstrating a lack of candor, the government purports to meet petitioner's contention that he was de-

nied a substantial constitutional right by the trial court's refusal to subpoena grand jurors by misrepresenting petitioner's argument. "The argument [of petitioner]," the government asserts (Brief, 11), "is that such witnesses [the grand jurors] could have testified to facts bearing on the materiality of the false testimony and on whether petitioner made the statements charged." It then goes on to state (Brief, 12): "[Petitioner] did not [at trial] and does not now point to anything elicited on cross-examination nor to any other evidence which would show a basis for a reasonable belief that there would be contrary evidence [to that coming from one grand juror who was put upon the stand by the government] from other jurors."

The government thereby simply ignores the principal contention of petitioner (Pet., 22, 23) that "both the indictment and the government's evidence suggested that the investigation in progress when the petitioner allegedly perjured himself might well have been an investigation within the cognizance of a grand jury in the Southern District of Illinois, where the office of the Director of Internal Revenue having jurisdiction over the territory is located, rather than that of the Eastern District of Illinois; yet if that were true no crime could have been committed in the Eastern District, regardless of how false the statements were."

And it further ignores petitioner's secondary contention (Pet., 23) that "even if this Court should not agree [that the record suggested a lack of territorial jurisdiction on the part of the grand jury], petitioner should have been afforded an opportunity to establish, if he could, that the activities of the grand jury below—the same grand jury indicted him that heard his alleged perjury—were not true inquisitorial exercises, but in fact were excursions with the purpose of extracting testimony with a view to perjury prosecution."

The government here does not allude to, but simply repeats, the inconsistency of the opinion of the Court of Appeals in ruling concurrently that grand jury proceedings are secret, but that the government may purport to disclose them by a single witness and the defendant is thereafter bound by that disclosure, and cannot inquire further.

3.

(Government's Brief, pp. 12-13).

The government does not allude to the crux of petitioner's complaint: that the prosecution below proceeded to elicit the claim to the protection of the Fifth Amendment a total of 74 times from witnesses who had previously been identified as friends or associates of the petitioner, and then, in respect of substantially half the questions, went ahead and proved the matters by other witnesses who did not claim the privilege and who were available to the prosecution from the start of the trial.

It was this conduct on the part of the prosecution, carried out after its refusal to engage in a pre-trial inquiry to determine whether the prospective witnesses would claim the privilege in front of the jury, that forms the basis of the petitioner's assertion of bad faith.

The assertion of the government here (Brief, 13) that petitioner's contention that the prosecution knew the witnesses would claim the privilege "has no factual basis" seems hollow indeed when it is considered that the prosecution was asked to participate in an inquiry to determine precisely that matter, and refused.

4.

(Government's Brief, pp. 14-18).

The government ignores or misstates certain basic facts in respect of the validity of the grand and petit juries in the case.

The **clerk alone** determined the qualification of jurors; some via questionnaires and some solely by friendship (App. [Appellee] 3-4; 26).

The questionnaires omitted an essential qualification, conviction of a crime (App. [Appellee] 1-19; Gov. Ex. 1—Questionnaire).

The government (Brief, 17) erroneously refers to the summons (Gov. Ex. 2) served on jurors whose names had previously been placed in the box as supposedly "qualified" jurors.

The clerk did not know and had never determined that 300 qualified jurors resided within the restricted area from which they were drawn (App. [Appellee] 11-18).

The grand jury **was in fact** drawn from a 150-mile restricted area (App. [Appellee] 32; Deft. Ex. 1—List of jurors drawn; Deft. Ex. 2—Map of district showing all jurors drawn **residing** within 150 miles of E. St. Louis; Deft. Ex. 3—Statement of jurors residing in all counties in district; Deft. Ex. 3A showing population of each county in District [submitted re Mofion to Dismiss].)

The petit jury was expressly drawn from the restricted area, pursuant to court order.

All jurors were drawn by a **sorting** process, in which neither the clerk nor jury commission inspected the names discarded by the other to determine if such discarded jurors were properly excluded (App. [Appellee] 23-24—Reed—Clerk; 28—Bolen—Jury Commissioner).

This process permitted the most arbitrary and capricious selection of jurors conceivable. Courts have consistently held that a showing of prejudice is unnecessary where the "capacity" therefor clearly exists.

In this case, the grand jury was drawn by the "sorting" process from a restricted area even though the court order did not expressly so order. Bolen J. Carter, jury commissioner, in his affidavit attached to the motion to dismiss, expressly so stated, and in his testimony (App. [Appellee] 32) he stated he had no recollection of not using the sorting process within the prior five or six years.

The defendant submitted certain exhibits in support of his motion to dismiss. Deft. Ex. 1 was a copy of the jury as drawn, containing names and addresses of the 30 jurors drawn, and the 22 used. Deft. Ex. 2 was a map of the State of Illinois, outlining the Eastern District of Illinois, and showing thereon the location by counties of the several jurors so drawn. The clerk verified this (App. [Appellee] 14). **All jurors** were drawn from 19 out of 45 counties—**all** located within 150 miles of East St. Louis.

Deft. Ex. 3—3a was a statistical analysis of the 45 counties in the Eastern District of Illinois, showing the number of jurors in the box in each county, and the population of each county (App. 15-16).

This analysis revealed that the population, and number of jurors in the jury box for the counties outside the 150 mile area was approximately equal to those within the restricted area.

And yet,—not one juror was drawn from within the restricted area.

The mathematical probabilities of drawing **30 jurors** from 19 counties, all within an area of 150 miles, and not **one juror** from beyond that area, are so remote as not to be arguable. This, coupled with the direct evidence of the

jury commissioner that the jury was in fact so drawn, constitutes conclusive evidence that the grand jury was improperly drawn—contrary to court order—and by an illegal procedure.

The illegality of **this** grand jury is not one of technicality but of substance. This is the grand jury which heard the defendant's testimony, upon which the indictment is based. It was a competent **tribunal**.

The government suggests that the trial court's order restricting the trial jury to an area within 150 miles of East St. Louis was proper—to conserve transportation expenses.

Even if **legally** so drawn—is not justice more important than economy? The defendant had insisted—by several motions to transfer—accompanied by voluminous documents—that a fair trial could not be secured with jurors drawn from near E. St. Louis. Despite this showing, the court deliberately restricted the trial jury to that area. Restriction—by the express wording of the statute—is to be employed to secure justice—by an impartial trial—not the reverse.

5.

(Government's Brief, pp. 19, 20.)

The government fails, in its reply brief, to answer several serious charges of denial of due process in prejudicial proceedings contained in the defendants' petition.

The government specifically omits any attempt to defend against the charge of trickery or bad faith, amounting to entrapment as charged in defendant's petition. The government has never denied these charges. To explain them would require an admission that the defendant is not in fact guilty of the charges contained in the indictment. (See analysis contained in Petition for Rehearing, 5 to 21; 57 to 70.)

The government answers only that portion of denial of due process relating to refusal of the trial court to permit an attorney for the defendant to withdraw from the case. In so answering the government incorrectly states or misinterprets a part of the record.

A reading of the entire record on the motions to withdraw and for continuance will reveal certain ambiguities. On June 19th, 1959, the court denied the motion to withdraw. On June 23rd only one motion—that for a continuance, was presented. Upon discussion thereof the court indicated he would permit the withdrawal. However, after granting the continuance, the court then specifically reconsidered the motion to withdraw and again specifically denied it. Mr. Raemer made a motion to strike which was granted. The motion does not state what was to be stricken. The government asserts it was the motion to withdraw, which had just been specifically denied. Ray M. Foreman, the attorney, knows this is not so for he approached the bench immediately thereafter and asked the court if he had not made a mistake in the order, denying the withdrawal, in view of his previous statements and of his allowance of the continuance. The court stated emphatically that there was no mistake; that the motion to withdraw was again denied. This conversation does not appear in the record and is here given solely to correct the misinterpretation placed in the discussion and motion to strike made by the government. The defendant and his attorney, Ray M. Foreman, have always assumed that the motion to withdraw was denied.

The attorney refrained from active participation in the trial because it was believed it might become necessary for him to testify, despite the court's ruling. However, in view of the lack of any direct evidence by the government as to the defendants' guilt, such attorney was not requested to become a witness.

CONCLUSION.

Petitioner respectfully submits that the petition for a writ of certiorari prayed should be allowed.

Respectfully submitted,

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